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No. 80-1759

In the Supreme Court of the United States

OCTOBER TERM, 1980

YELLOW FREIGHT SYSTEM, INC., AND DUNCAN CERAMICS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners may take an interlocutory appeal from a pretrial ruling that they were properly charged by information rather than a grand jury indictment.

2. Whether petitioners have a right to be charged by an indictment even though the allegations against them cannot under any circumstances result in imprisonment.

3. Whether petitioners may take an interlocutory appeal from a pretrial ruling that they are not entitled to a preliminary hearing on charges set forth in an information.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statutory provision involved 1

Statement 2

Argument 3

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 ..... 4, 5, 6, 7, 8, 10

Armored Transport, Inc. v. *United States*, cert. denied, No. 80-948 (Mar. 2, 1981) 9

Bain, Ex parte, 121 U.S. 1 7

Beck v. *Washington*, 369 U.S. 541 11

Berman v. *United States*, 302 U.S. 211 4

Cobbledick v. *United States*, 309 U.S. 323 ..... 4, 6

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 ..... 4, 10

DiBella v. *United States*, 369 U.S. 121 4

Duke v. *United States*, 301 U.S. 492 10

Firestone Tire & Rubber Co. v. *Risjord*, No. 79-1420 (Jan. 13, 1981) 4, 5

Gerstein v. *Pugh*, 420 U.S. 103 ..... 10, 11

Page

Cases—Continued:

Green v. *United States*, 356 U.S. 165 10

Heike v. *United States*, 217 U.S. 423 6

Helstoski v. *Meanor*, 442 U.S. 500 ..... 5, 6

Kordel v. *United States*, 335 U.S. 345 10

Lem Woon v. *Oregon*, 229 U.S. 586 11

Mackin v. *United States*, 117 U.S. 348 9

Ocampo v. *United States*, 234 U.S. 91 11

Parr v. *United States*, 351 U.S. 513 6

Roche v. *Evaporated Milk Association*, 319 U.S. 21 6

Stack v. *Boyle*, 342 U.S. 1 5

United States v. *Calandra*, 414 U.S. 338 7

United States v. *Central Liquor Co.*, 628 F. 2d 1264, cert. denied, No. 80-556 (Dec. 1, 1980) 6

United States v. *Griffin*, 617 F. 2d 1342 ..... 7, 8

United States v. *MacDonald*, 435 U.S. 850 ..... 4, 6, 11

United States v. *Sorren*, 605 F. 2d 1211 6

United States v. *Wilson*, 639 F. 2d 500 ..... 7, 8

United States v. *Wright*, 622 F. 2d 792, cert. denied, No. 80-5469 (Nov. 3, 1980) 6

Wilson, Ex parte, 114 U.S. 417 10

Page

Constitution, statutes and rules:

United States Constitution, Fifth Amendment 7, 9

Interstate Commerce Act, 49 U.S.C. 1 *et seq.*, and as recodified by the Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337, 49 U.S.C. (Supp. III) 10101 *et seq.* 2

49 U.S.C. 41 2
49 U.S.C. 41(1) 1, 2, 10
49 U.S.C. (Supp. III) 11903 2

28 U.S.C. 1291 4

Fed. R. Crim. P. :

Rule 5 11
Rule 5(a) 12
Rule 5(c) 11
Rule 5.1(a) 12
Rule 5.1(b) 12

Miscellaneous:

Advisory Committee Notes to Fed. R. Crim. P. 5 11

1 C. Wright, *Federal Practice and Procedure* (1969) 10

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 637 F. 2d 1248. The opinions of the district court (Pet. App. A15-A17) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1980. A petition for rehearing was denied on February 20, 1981 (Pet. App. A13-A14). The petition for a writ of certiorari was filed on April 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

49 U.S.C. 41(1) provides in relevant part:

> * * * Every person or corporation, whether carrier or shipper, who shall, knowingly offer, grant, or give, or solicit, accept or receive any * * * rebates, conces-

sion, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided,* That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title or of the Act to regulate commerce and the Acts amendatory thereof * * * or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. * * *[1]

STATEMENT

The relevant facts in this case, which are not in dispute, are set forth in the opinion of the court of appeals (Pet. App. A2-A3). Petitioners are two corporations. Petitioner Yellow Freight System is a motor carrier. Petitioner Duncan Ceramics is a manufacturer and user of freight services. In November 1977, the United States filed informations against petitioners in the United States District Court for the Eastern District of California. Those informations alleged that on 50 occasions petitioner Yellow Freight System gave, and petitioner Duncan Ceramics received, rate concessions on interstate shipments of goods, in violation of the Elkins Act, 49 U.S.C. 41. Section 41(1) of the Act proscribes rate concessions and imposes a fine of $1,000 to

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[1]After the filing of the informations against petitioners under 49 U.S.C. 41(1), the Interstate Commerce Act was recodified. See Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337, 49 U.S.C. (Supp. III) 10101 *et seq.* The penal provision relevant to this case now appears at 49 U.S.C. (Supp. III) 11903. The recodification introduced no substantive change in the law. Section 3 of Pub. L. No. 95-473, 92 Stat. 1466, provides that the new statute "may not be construed as making a substantive change in the laws replaced," and that offenses committed under prior law are deemed to be offenses committed under the corresponding provision of the new law.

$20,000 on corporations that violate the Act. Natural persons who engage in the grant or receipt of illegal concessions may be imprisoned in a penitentiary for up to two years. *Ibid.*

In April 1979, petitioners moved to dismiss the informations. They contended that the informations were defective because they alleged "infamous" crimes that could not be prosecuted without a grand jury indictment. They also contended that the prosecutions could not proceed without a preliminary finding of probable cause. The district court denied those motions (Pet. App. A15-A17), noting, *inter alia*, that petitioners are corporations not subject to imprisonment and that a charge against a corporation under the Elkins Act, which can result in nothing more than a fine or forfeiture, is not an allegation of an "infamous crime" requiring indictment by a grand jury.

Petitioners attempted to take an immediate appeal from the district court's pretrial ruling denying their motions to dismiss the informations. The court of appeals affirmed the district court's decision in part, and dismissed the attempted interlocutory appeal in part. The court affirmed the district court's ruling that petitioners had no right to be prosecuted pursuant to a grand jury indictment (Pet. App. A8-A12). It also held that petitioners' claims concerning their entitlement to a finding of probable cause were not appealable on an interlocutory basis, and dismissed the appeal relating to that issue (*id.* at A6-A8). In refusing to entertain an interlocutory appeal on that issue, the court of appeals noted that petitioners' theory concerning their entitlement to a probable cause determination was "foreclosed" by decisions of this Court (*id.* at A8).

ARGUMENT

1. Petitioners argue (Pet. 5-18) that they were entitled to be charged by a grand jury and therefore the informations against them should be dismissed. They assert that, because natural persons may receive two-year prison sentences for

violations of the Elkins Act, similar violations by corporations must be deemed "infamous crimes" even though Congress has provided that corporations are subject only to fines. That contention is not subject to appeal on an interlocutory basis. In addition, the contention is foreclosed by governing decisions of this Court.

Although the court of appeals entertained petitioners' interlocutory appeal on the grand jury issue and decided the question adversely to petitioners on the merits, we submit that interlocutory review is barred by the final judgment requirement embodied in 28 U.S.C. 1291. The finality requirement contemplates a lower court decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." See *Firestone Tire & Rubber Co.* v. *Risjord*, No. 79-1420 (Jan. 13, 1981), slip op. 5; *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940). And, of course, "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." *Berman* v. *United States*, 302 U.S. 211, 212 (1937). Adherence to the rule of finality is particularly important in criminal cases because "the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." *DiBella* v. *United States*, 369 U.S. 121, 126 (1962); see also *United States* v. *MacDonald*, 435 U.S. 850, 853-854 (1978); *Abney* v. *United States*, 431 U.S. 651, 656 (1977).

The traditional requirement of a final judgment is not satisfied here since the denial of petitioners' motion to dismiss obviously did not terminate the criminal proceedings in the district court. The court of appeals nonetheless concluded that the district court's order was immediately appealable because it satisfied the standards for the "collateral order" exception to the final judgment rule, which was first pronounced in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and since then applied in only

three criminal cases: *Stack* v. *Boyle*, 342 U.S. 1 (1951) (reasonable bail guarantee); *Abney* v. *United States*, *supra* (double jeopardy guarantee); *Helstoski* v. *Meanor*, 442 U.S. 500 (1979) (speech or debate privilege). However, as this Court recently emphasized in *Firestone Tire & Rubber Co.* v. *Risjord*, *supra*, slip op. 6, the collateral order exception is "a narrow exception" that applies only to a "small class" of interlocutory orders. In particular, an interlocutory order will not be afforded immediate review if effective review may be had after completion of trial. *Id.* at 7.[2]

The claim that an accused has been deprived of a right to indictment by a grand jury is not one that will be irreparably lost unless vindicated in a pretrial appeal, and it does not fall within the "small class" of interlocutory orders subject to immediate review. Should petitioners ultimately be convicted, their claim that the institution of the prosecution was defective could be fully litigated in the normal course of appeal from a final judgment. That, of course, requires petitioners to proceed to trial on the merits, but the desire to avoid the burdens of trial is not a basis for departing from the final judgment rule (except in the special circumstances

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[2]The cases in which this Court has permitted "collateral order" appeals have little similarity to the present case. In *Abney*, the defendant was subjected to a *retrial* over his objection that the second trial was barred by the Double Jeopardy Clause. Petitioners, in contrast, have not yet defended themselves in any trial. In *Helstoski*, the Court held that a Congressman was entitled to an interlocutory appeal to assert his Speech or Debate Clause privilege because the Speech or Debate Clause was designed to protect Congressmen "not only from the consequences of litigation's results but also from the burden of defending themselves" (442 U.S. at 508). In *Stack*, the Court concluded that a delayed appeal of the issue of bail entitlement would totally undermine the constitutional right to reasonable bail prior to and during trial. In each of these cases, the particular nature of the constitutional guarantee and the facts of record led to the conclusion that the interlocutory orders in question were "effectively unreviewable on appeal from a final judgment." *Firestone Tire & Rubber Co.* v. *Risjord Co.*, *supra*, slip op. 7.

involved in *Abney* and *Helstoski*). As this Court observed in *Cobbledick* v. *United States, supra,* 309 U.S. at 325-326:

> Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must wait his conviction before its reconsideration by an appellate tribunal.

Accord, *Roche* v. *Evaporated Milk Association,* 319 U.S. 21, 30 (1943); *United States* v. *MacDonald, supra,* 435 U.S. at 860 n.7.

Accordingly, both this Court and the courts of appeals frequently have held that claims of defects in the institution of a prosecution are insufficient to establish the kind of irreparable damage that would warrant an immediate appeal. See, *e.g., United States* v. *MacDonald, supra,* 435 U.S. at 860 (claim that an indictment was barred by the Sixth Amendment's Speedy Trial guarantee); *Abney* v. *United States, supra,* 431 U.S. at 662-663 (claim that an indictment did not state an offense); *Parr* v. *United States,* 351 U.S. 513, 518-521 (1956) (claim that a superseding indictment had been improperly brought to defeat the defendant's successful transfer motion); *Heike* v. *United States,* 217 U.S. 423, 430-431 (1910) (claim that an indictment was barred because of a statutory immunity grant).[3] Petitioners' claim here does not differ materially from the

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[3]See also *United States* v. *Central Liquor Co.,* 628 F. 2d 1264, 1266 (10th Cir.), cert. denied, No. 80-556 (Dec. 1, 1980) (claim that the prosecutor improperly pyramided charges to prejudice the defendant at trial); *United States* v. *Wright,* 622 F. 2d 792, 793-794 (5th Cir.), cert. denied, No. 80-5469 (Nov. 3, 1980) (claim of prosecutorial abuse and overreaching); *United States* v. *Sorren,* 605 F. 2d 1211, 1213-1215 (1st Cir. 1979) (claim of lack of personal jurisdiction due to governmental involvement in defendant's abduction in a foreign country).

claims in the foregoing cases, where the courts properly have denied interlocutory appeals despite assertions that the defendants were immune from federal prosecution on various statutory and constitutional grounds.[4]

In the wake of *Abney*, the Ninth Circuit has taken a singularly expansive view of the kinds of interlocutory orders that should be treated as collateral to a criminal case and therefore appealable before trial. It has permitted interlocutory appeals not only of claims that a proceeding was improperly instituted for lack of an indictment, as here, but also of claims that certain portions of an indictment have been added as a result of prosecutorial vindictiveness (*e.g.*, *United States* v. *Griffin*, 617 F. 2d 1342 (1980)) and that there has been impermissible selective prosecution (*United States* v. *Wilson*, 639 F. 2d 500 (1981)). The consequence of this position has been a plethora of pretrial appeals in the Ninth Circuit that have both burdened the court and delayed the prompt administration of criminal justice, even though the vast majority of these appeals were found lacking in merit. This situation has been of concern not only to the Department of Justice, but to at least some of the judges on the Ninth Circuit itself. See *United States* v. *Wilson*, *supra*, 639 F. 2d at 502 n.1.

It may well be that we will ask this Court at some point to undertake review of the propriety of the Ninth Circuit's expansive allowance of interlocutory appeals. This might be done even in a case in which the claims on the merits are not substantial, as was the situation in *Abney*. We do not do so in the present case for two reasons. First, we believe that there presently exists a realistic prospect that the Ninth

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[4]The underlying purpose of the Fifth Amendment's Indictment Clause—to protect against false charges or unwarranted harassment (see *United States* v. *Calandra*, 414 U.S. 338, 342-343 (1974); *Ex parte Bain*, 121 U.S. 1, 11 (1887))—can be effectuated by dismissal of any improper prosecution by an appellate court.

Circuit would be willing to reconsider its position in this area, and we are seeking an appropriate case in which to ask it to undertake en banc review of the jurisdictional issue.[5] Should it agree to do so and, upon reconsideration, overrule decisions such as *Griffin* and *Wilson*, there may be no need for this Court to consider the question, since, at least at present, we are not aware of any other circuits that have followed the lead of the Ninth Circuit in expanding the availability of interlocutory appeals in criminal cases.

Our second reason for not inviting review of the jurisdictional issue in the present case is that the particular claim held reviewable here—the need for an indictment—is one that arises infrequently. If the Court is to review the appealability issue, we believe it would be preferable to do so in a vindictive prosecution case, which, along with *Abney* claims, makes up the bulk of pretrial appeals in criminal cases in the Ninth Circuit. Indeed, because of the difference in character between the instant claim and vindictive or selective prosecution claims, it is uncertain whether a decision of the jurisdictional issue in the present case would resolve the more important issue in the other, more common cases.

2. In any event, even if petitioners' arguments about their right to a grand jury indictment were properly before this Court at this time, the court of appeals correctly ruled on the merits that petitioners do not have a constitutional right to be charged by indictment (Pet. App. A8-A12).

Petitioners argue broadly (Pet. 5-18) that because the Elkins Act provides for a possible punishment of two years' imprisonment for natural persons, any offense under the Elkins Act is therefore an "infamous" crime and is chargeable only by grand jury indictment. However, petitioners

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[5]It is, of course, somewhat difficult for us to request en banc rehearing in cases in which we have prevailed on the merits.

wholly ignore the fact that, under the statute, Congress has prescribed separate punishments for corporations and natural persons. Because petitioners are corporations, they cannot, under any circumstances, be subjected to imprisonment. As the court of appeals emphasized (Pet. App. A9 & n.6), the Elkins Act treats individuals and corporations differently and "by its terms limits penitentiary confinement to individuals."[6]

The court of appeals correctly ruled that a corporation, which cannot be subjected to the penalty of imprisonment, is not exposed to infamous punishment and is not entitled to be indicted by a grand jury. There is no conflict among the circuits. No court has ever held that a corporation, exposed only to fines for violation of a regulatory statute, must be prosecuted by indictment. Moreover, this Court recently denied review in a case presenting the same issue under the Sherman Act. See *Armored Transport, Inc.* v. *United States*, cert. denied, No. 80-948 (Mar. 2, 1981).[7] Petitioners offer no reason for granting review of the same question in this case.

The decisions of this Court establish that it is the nature of the punishment that may be imposed upon the defendant, not the abstract nature of the offense, which determines whether the crime is infamous for purposes of the Indictment Clause of the Fifth Amendment. See, *e.g.*, *Mackin* v. *United States*, 117 U.S. 348, 350 (1886). Punishment by fine, rather than by imprisonment in a penitentiary for more

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[6]Petitioners concede (Pet. 17-18) that "[i]f the maximum prison term provided for in the statute is over one year, it is an infamous crime. If the maximum sentence is one year or less, it is most likely not infamous * * *." Applying that standard, it is plain that the crimes alleged in this case are not "infamous crimes," since petitioners are exposed to no prison sentences at all.

[7]We are forwarding a copy of our brief in opposition in *Armored Transport* to petitioners.

than one year, demonstrates that the offense is not "infamous." See, *e.g., Green* v. *United States,* 356 U.S. 165, 183 (1958); *Kordel* v. *United States,* 335 U.S. 345, 348 n.3 (1948); *Duke* v. *United States,* 301 U.S. 492, 493-495 (1937); *Ex parte Wilson,* 114 U.S. 417, 423-426 (1885); see also 1 C. Wright, *Federal Practice and Procedure* § 121, at 212-213 (1969) (collecting cases). Accordingly, because petitioners are subject only to a fine under 49 U.S.C. 41(1), and are not "in danger of being subjected to an infamous punishment if convicted," the Constitution does not require the government to proceed by indictment. *Ex parte Wilson, supra,* 114 U.S. at 426.

3. Petitioners finally argue (Pet. 18-28) that, if only an information is required to bring charges against them, a pretrial judicial finding of "probable cause" is a prerequisite to holding them to answer. The district court rejected that claim on the merits and the court of appeals declined to reach it for want of appellate jurisdiction. The court of appeals noted that petitioners have failed to assert an "important right" (see *Abney* v. *United States, supra,* 431 U.S. at 658) that requires immediate appellate review, since petitioners rely on "a legal theory foreclosed by the Supreme Court" (Pet. App. A8).[8] In particular, the court of appeals found that petitioners' argument was defeated by this Court's decision in *Gerstein* v. *Pugh,* 420 U.S. 103, 119 (1975), which reaffirmed the well-established rule that "a judicial hearing is not prerequisite to prosecution by information."

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[8]In the seminal decision of *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546-547 (1949), which originally prescribed the "collateral order" exception to the final judgment rule, this Court emphasized that the claim raised by the interlocutory appeal in that case presented "a serious and unsettled question" and that the question was "too important to be denied review." When it appears that the contention sought to be litigated on appeal is foreclosed by a decision of this Court, however, it is wholly proper to summarily dismiss the appeal. *Ibid.*

We agree with the court of appeals that petitioners are not entitled to interlocutory review of their probable cause contention. For the reasons summarized on pages 4-7, *supra*, that claim does not involve a right that would be irreparably lost absent immediate review. If petitioners have been wrongly denied a probable cause hearing, they may present that contention in the court of appeals following a final judgment. The fact that petitioners will be forced to stand trial due to the denial of immediate appellate review is not a basis for departing from the final judgment requirement. See *United States* v. *MacDonald*, *supra*, 435 U.S. at 860 n.7.

We also agree that prior decisions of this Court establish that petitioners' claim is frivolous. In addition to the *Gerstein* case, which reaffirms that a preliminary finding of probable cause is not required before proceeding to trial on an information, see *Beck* v. *Washington*, 369 U.S. 541, 545 (1962), which notes that prosecutions by information have been filed "on many occasions without even a prior judicial determination of 'probable cause' " and have "had approval here." See, *e.g.*, *Ocampo* v. *United States*, 234 U.S. 91, 100-101 (1914); *Lem Woon* v. *Oregon*, 229 U.S. 586, 587-590 (1913). Petitioners cite no relevant authority to the contrary.[9]

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[9]Petitioners refer to Fed. R. Crim. P. 5 in support of their argument that a preliminary hearing is required. However, Rule 5(c) states unequivocally that a "preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination." The Notes of the Advisory Committee on the 1972 amendments to Rule 5 point out that the Rule "makes clear that a defendant is not entitled to a preliminary examination if he has been indicted by a grand jury prior to the date set for the preliminary examination, or, in appropriate cases, if any information is filed in the district court prior to that date." As

CONCLUSION

The petition for a writ of certiorari should be denied.

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noted above, this is an "appropriate case" for prosecution by information. Accordingly, there is no need for a judicial finding of "probable cause."

Finally, we note that one of the principal purposes of a probable cause hearing—to avoid unnecessary pretrial incarceration of persons arrested by law enforcement officers on insufficient grounds—is completely inapplicable to a corporate defendant not subject to arrest and incarceration. See Fed. R. Crim. P. 5(a), 5.1(a)-(b).

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